Robin Tan Pang Heng (suing as Public Officer, Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–288 OF 1995
KAMALANATHAN RATNAM J
21 NOVEMBER 2001

Labour Law *— Trade unions — Cancellation of registration — Employer refused recognition and sought cancellation of registration — Failure to appeal decision of Director of Trade Union to minister — Whether remedy to appeal under s 71A of Trade Unions Act 1959 must be exhausted before suit could be filed — Trade Unions Act 1959 ss 2(2), 12(1) & 71A*

The plaintiff was at all material times the General Manager and Public Officer of Penang Turf Club registered under the Societies Act 1966. The first defendant, the Director General of Trade Unions was the officer empowered by the Trade Unions Act 1959 ('the Act') responsible in law for the registration of all trade unions. The second defendant was a trade union registered under s 12(1) of the Act. The plaintiff objected to the second defendant's recognition as a trade union and the issuance of a certificate of registration of such by the first defendant, because the plaintiff contended that the second defendant was representing casual workers and that in law a trade union could not be registered to represent casual workers and that the workers did not fall within the purview of Part XII of the Employment Act 1955, and thus not entitled to organize themselves and form a trade union of workers. The plaintiff prayed for, inter alia, a declaration that the registration of the second defendant by the first defendant was null and void. The first defendant stated that the registration of the second defendant was regular and in compliance with the Trade Unions Regulations 1959 and the members of the union were paid workers of the club. The second defendant pleaded, inter alia, that the workers were regularly employed on a periodic basis, were not casual workers and that there was a contract between the plaintiff and the workers. On 1 October 2001, when the matter came up for hearing, counsel for the first defendant raised a preliminary objection that the plaintiff ought not to have commenced the suit without further exhausting his remedy under s 71A of the Act as amended in 1994. There were no objection to this.

Held, upholding the preliminary objection and dismissing the suit with costs:

(1) Section 2(2) of the Act empowered the first defendant to register the second defendant. If that decision of the first defendant was unsatisfactory, there was ample opportunity for the plaintiff to appeal and the Act specifically spelled out that the plaintiff, if dissatisfied with the decision of the second defendant made under

s 2(2) of the Act, may within 30 days of that decision, appeal against that decision to the minister. The first defendant issued the registration of the second defendant as a trade union on 22 November 1994. There was no evidence that the plaintiff had appealed to the authorities within 30 days from the date of that decision. In fact, sub-s (4) of s 71A clearly stated that the decision of the minister made under that section on appeal shall be final and conclusive (see p 473E–G).

(2) The appeal to the minister should have been done within 30 days of the decision. Surely that decision would have been more expeditiously obtained from the minister than this present judicial review, which although filed on 6 April 1995 had taken six years and six months to conclude on a preliminary issue. In this case, other than the issue of the plaintiff that the members of the second defendant were merely casual workers, there was no affidavit or other evidence or even a plea in the statement of claim that the first defendant had acted unfairly or had abused his powers or had acted in breach of any rules (see p 474E–F).

[Bahasa Malaysia summary

Plaintif pada setiap masa matan adalah Pengurus Besar dan Pegawai Awam Kelab Lumba Pulau Pinang yang didaftarkan di bawah Akta Persatuan 1966. Defendan pertama, Ketua Pengarah Kesatuan Sekerja merupakan pegawai yang diberi kuasa oleh Akta Kesatuan Sekerja 1959 ('Akta tersebut') bertanggungjawab di sisi undang-undang untuk mendaftarkan semua kesatuan sekerja. Defendan kedua adalah sebuah kesatuan sekerja yang didaftarkan di bawah s 12(1) Akta tersebut. Plaintif telah membantah kepada pengiktirafan defendan kedua sebagai sebuah kesatuan sekerja dan pengeluaran sijil pendaftarannya oleh defendan pertama, kerana plaintif menghujah-kan bahawa defendan kedua mewakili pekerja-pekerja sambilan dan bahawa di sisi undang-undang sebuah kesatuan sekerja tidak boleh didaftarkan untuk mewakili pekerja-pekerja sambilan dan bahawa pekerja-pekerja tersebut tidak jatuh di bawah lingkungan Bahagian XII Akta Pekerjaan 1955, dan oleh itu tidak berhak untuk menubuh dan membentuk kesatuan sekerja. Plaintif memohon, antara lain, satu deklarasi bahawa pendaftaran defendan kedua oleh defendan pertama adalah batal dan tidak sah. Defendan pertama menyatakan bahawa pendaftaran defendan kedua adalah mengikut peraturan dan menurut Peraturan Kesatuan Sekerja 1959 dan ahli-ahli kesatuan tersebut adalah pekerja berbayar kelab tersebut. Defendan kedua mempli, antara lain, bahawa pekerja-pekerja tersebut sering diambil sebagai pekerja yang berkala, bukan pekerja sambilan dan bahawa terdapat kontrak antara plaintif dan pekerja-perkerja tersebut. Pada 1 Oktober 2001, apabila perkara tersebut dibicarakan, peguam bagi pihak defendan pertama telah menimbulkan bantahan awal bahawa plaintif tidak sepatutnya memulakan guaman tanpa

terlebih dahulu menghabiskan remedi beliau di bawah s 71A Akta tersebut sebagai mana yang telah dipindah dalam tahun 1994. Tiada bantahan terhadap perkara ini. A

Diputuskan, mengekalkan bantahan awal tersebut dan menolak guaman tersebut dengan kos: B

(1) Seksyen 2(2) Akta tersebut memberi kuasa kepada defendan pertama untuk mendaftarkan defendan kedua. Jika keputusan defendan pertama tidak memuaskan, terdapat peluang yang lebih daripada cukup untuk plaintif membuat rayuan dan Akta tersebut dengan khusus menyatakan bahawa plaintif, jika tidak berpuas hati dengan keputusan defendan kedua yang dibuat di bawah C s 2(2) Akta tersebut, boleh dalam tempoh 30 hari daripada keputusan tersebut, merayu terhadap keputusan menteri tersebut. Defendan pertama mengeluarkan pendaftaran defendan kedua sebagai sebuah kesatuan sekerja pada 22 November 1994. Tiada keterangan bahawa plaintif telah membuat rayuan kepada pihak berkuasa dalam tempoh 30 hari daripada tarikh keputusan D tersebut. Bahkan, sub-s (4) kepada s 71A dengan jelas menyatakan bahawa keputusan menteri yang dibuat di bawah seksyen tersebut atas rayuan sepatutnya muktamad dan konklusif (lihat ms 473E–G).

(2) Rayuan kepada menteri hendaklah dibuat dalam tempoh 30 hari E daripada keputusan tersebut. Pastinya keputusan tersebut akan lebih cepat diperolehi daripada menteri berbanding daripada kajian semula kehakiman sekarang ini, yang mana walaupun telah difailkan pada 6 April 1995 telah mengambil masa enam tahun dan enam bulan untuk menyelesaikan satu persoalan yang utama. Dalam kes ini, selain daripada persoalan plaintif bahawa ahli-ahli F defendan kedua hanya pekerja-pekerja sambilan, tidak terdapat afidavit atau apa-apa keterangan lain ataupun satu pli dalam pernyataan tuntutan bahawa defendan pertama telah bertindak dengan tidak adil atau telah menyalahgunakan kuasa beliau atau telah bertindak melanggar mana-mana peraturan (lihat G ms 474E–F).]

Notes

For cases on cancellation of registration, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1394–1395. H

Cases referred to

Electrical Industry Workers Union v Registrar of Trade Unions & Anor [1976] 1 MLJ 177 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd) I

A *Metal Industry Employees Union v Registrar of Trade Unions & Ors* [1976] 1 MLJ 220 (refd)

Legislation referred to

B Employment Act 1955 Part XII
Societies Act 1966
Trade Unions Act 1959 ss 2(1), (2), 12(1)
Trade Unions Regulations 1959

K Prakash (*Shook Lin & Bok*) for the plaintiff.
Mazni bte Buang (Federal Counsel) for the first defendant.
C *P Subramaniam* (*BC Teh & Yeoh*) for the second defendant.

Kamalanathan Ratnam J:

The preamble

D This matter, which was initially commenced as an originating summons, was filed on 6 April 1995, and on 10 April 1996, the same was converted to a writ action. After a long and chequered history, the case finally came up for hearing on 1 October 2001. When the matter was called up, counsel for the plaintiff requested for an adjournment. Counsel for the first defendant then informed the court that she had a preliminary objection to raise. E Counsel for the plaintiff did not inform the court his reason for requesting an adjournment in spite of the court asking him why he wanted an adjournment. The matter was then stood down to enable the parties to sort out the plaintiff's solicitors request. When the case was recalled for hearing, counsel for the first defendant took an unusual step by making a preliminary objection before the trial commenced. I was surprised when counsel for the F plaintiff raised no objections to this. I therefore assumed that notice of any preliminary objection had already been given by the first defendant's solicitors since the matter was for full trial. I was again surprised when counsel for the plaintiff did not object to the matter proceeding to be resolved on a preliminary issue when it was in fact set for full trial. When G parties, represented by competent solicitors, agree to a mode of procedure, so long as it does not transgress any rule of law, the court hearing the case ought to accede to the views of counsel who know best the conduct of their respective cases.

The plaintiff's case

H The plaintiff was at all material times the General Manager and Public Officer of the Penang Turf Club, registered under the Societies Act 1966. The first defendant, the Director General of Trade Unions is the officer empowered by the Trade Unions Act 1959 ('the Act') responsible in law for the registration of all trade unions. The second defendant is a trade union I registered under s 12(1) of the Act.

On 23 December 1994, the second defendant forwarded to the plaintiff a notice of claim for recognition together with a certificate of registration

issued by the first defendant under the rules of the union. The plaintiff replied by his letter dated 13 February 1995 that the club was unable to accord recognition to the second defendant. The plaintiff who contended that the second defendant was representing casual workers, refused to recognize the second defendant because he was of the view that in law, a trade union cannot be registered to represent casual workers, who are only hired to work on weekends or other race days. It was the plaintiff's case that these casual workers are principally involved on race days which normally fall on weekends and on public holidays. They are hired to perform casual work on race days under the following conditions:

(i) two days of work per week (weekends);

(ii) between five to six hours of work per day;

(iii) the workers are paid a fixed allowance for the day they actually worked, ie if they do not work, then they are not paid any allowance for that day;

(iv) contribution to the Employees' Provident Fund ('EPF') and Social Security Organization ('SOCSO') are made by the workers and the plaintiff;

(v) the workers are not entitled to any annual leave nor public holiday leave;

(vi) the workers are not given any sick leave or any medical benefits;

(vii) the wages of the workers, are, for administrative reasons, paid fortnightly.

The plaintiff further pleaded that the workers turn up for work on race days (weekends/public holidays) of their own free choice. Hence, if any worker is unable to turn up for work, then a replacement worker would be hired or assigned to the particular job. In the result, if a worker is not able to turn up for work then he/she would not be paid any wages. The plaintiff does not exercise any disciplinary rights over the workers as to their attendance or absence. The matter is left entirely to their free will as to whether they wish to work for the weekend and on race days and earn some extra income. The plaintiff further pleaded that most, if not all of these weekend raceday workers are regularly employed elsewhere, which is their real employment. The work done for the plaintiff is casual work over the weekend and on race days. It was the plaintiff's case that such workers who are hired to work at the Penang Turf Club are casual workers who are paid, only if they turn up for work in accordance with the 'no work no pay' principle, and that such workers are engaged on a 'hired for the day' basis for each day when he/she turns up for work. The plaintiff further pleaded that by reason of the peculiar circumstances and characteristics of the work being carried out only on race days (weekend/public holidays) and there being an acceptance by all the workers who turn up for work that they work on the basis of 'no work no pay', such workers are in law treated as casual workers, who do not fall within the purview of Part XII of the Employment Act 1955, and neither are these workers entitled to any benefits under any collective agreement, and that as a result thereof, such workers are not entitled to organize

A themselves and form a trade union of workers. The plaintiff therefore prayed for:

(1) a declaration that the registration of the second defendant by the first defendant vide certificate of registration no 737 dated 22 November 1994 pursuant to s 12(1) of the Act is null and void and of no effect;

B (2) a consequential order that certificate of registration no 7376 dated 22 November 1994 issued by the first defendant abovenamed pursuant to s 12(1) of the Act be and is hereby revoked and cancelled;

(3) costs; and

(4) such further and/or other consequential orders or directions that may C be necessary or which this honourable court deems fit and proper.

The defence

The principal defence of the first defendant was that the second defendant's registration as a trade union is regular and in compliance with the provisions D of the Trade Unions Regulations 1959. The first defendant further averred that the members of the union are paid workers of the Penang Turf Club. A large number of them are working as 'deputy operators' and 'salesmen/saleswomen'. In the premises, these workers come within the definition of 'employee' under s 2(1) of the Act. The second defendant pleaded that its workers invariably are retained by the plaintiff to carry out the work at the E plaintiff's premises. A substantial portion of the workers have been employed by the plaintiff for over a decade in the same job by the plaintiff under the following general terms and conditions of employment:

(i) the workers are required to work two days per week during all the weekends and regularly for six hours or more per day at the disposal F of the plaintiff;

(ii) equipment and instruments as well as uniform and employees' badges are provided by the plaintiff to the workers for their use;

(iii) the workers are assigned to specific tasks and regularly positioned at the same work posts during their course of work;

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(iv) the workers are not required to inform the plaintiff before reporting for work on all the weekends provided they are willing and able to work on these days. All the workers who turn up are always remunerated irrespective of whether work is provided and or is available to them on the said days;

H (v) the workers receive fixed payment for the days they work and also additional payment for races conducted in excess of eight races in a day and beyond the usual hours of work;

(vi) payment of wages are not made daily but fortnightly in arrears on a regular basis;

I (vii) contribution to the EPF and SOCSO are deducted at source before the balance of wages is handed over to the workers. Such contribution, commenced in the years 1986/1987 or thereabouts continues till to

date;

(viii) returns of remuneration from employment (EA form) are also prepared by the plaintiff for some of the workers and duly submitted to the Inland Revenue Department; and

(ix) the workers are also required to attend training conducted by the plaintiff from time to time to upgrade their skills and competence.

It was the second defendant's case that workers employed by the plaintiff on race days are persons regularly employed on a periodic basis and are thus not casual workers, and that the 'no work no pay' principle does not make a worker who has a contract of employment a casual worker, and that a daily rated/paid worker who is an employee and who receives no pay on his non-working day, yet his status as a worker under a contract of employment is not affected. The second defendant further pleaded that by reason that the plaintiff exercises control through its totalizator manager and other staff over the manner in which the workers perform their work, there is therefore in existence a contract between the plaintiff and the workers. It was also the case of the second defendant that the workers are 'part and parcel' of the plaintiff's organization and thus an integral part of the plaintiff's business. The workers provide their own labour and skill to the plaintiff in their performance of the work. There is no investment of capital and the workers do not stand to profit from the commercial success of the plaintiff. They further pleaded that owing to the longstanding and regular course of dealings between the plaintiff and the second defendant's members over the years, there exists sufficient mutuality and permanency for there to be an overall employment relationship that amounts to a contract of employment. The terms of employment are also not inconsistent with there being a contract of employment. It was the second defendant's case that the race day workers are entitled to organize themselves and form a trade union of workers.

Findings of the court

The preliminary objection raised by the first defendant and supported by the second defendant was that the plaintiff ought not to have commenced this suit without further exhausting his remedy under s 71 of the Amended Act 1994. The relevant s 71A (which previously was s 17(1) of the Act) reads as follows:

> (1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, given, made or effected by the Director General under any of the following provisions:
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> (a) s 2(2);
> (b) s 12;
> (c) s 15(2)(b) or (4);
> (d) s 16(1);
> (e) s 17(1);
> (f) s 25A(4);
> (g) s 28(1)(d), or s 29(2)(b);

A (h) s 34(2);
(i) s 40(6) or (9);
(j) s 54(1);
(k) s 76A(1); or
(l) s 76C(1).

B may, within thirty days from the date of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

(2) An appeal under sub-s (1) shall not operate as a stay of execution of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, of the Director General unless the Minister C otherwise directs, and where he so directs he may impose such terms and conditions as he deems fit.

(3) The Minister may, after considering any such appeal, give such decision thereon as he deems just and proper.

(4) A direction or decision of the Minister under this section shall be final D and conclusive.

Section 2(2) of the Act reads as follows:

(2) For the purposes of the definition of 'trade union' in sub-s (1), and for the purposes of ss 32, 33, 72 and 74, 'similar' means similar in the opinion of the Director General.'

E To my mind the plaintiff had no leg to stand on. Section 2(2) of the Act empowers the first defendant to register the second defendant. If that decision of the first defendant was unsatisfactory, there is ample opportunity for the plaintiff to appeal and the Act specifically spells out that the plaintiff, if dissatisfied with the decision of the second defendant made F under s 2(2) of the Act, may within 30 days of that decision appeal against that decision to the minister. The first defendant issued the registration of the second defendant as a trade union on 22 November 1994. There is no evidence that the plaintiff had appealed to the authorities within 30 days from the date of that decision. In fact, sub-s (4) of s 71A clearly states that the decision of the minister made under that section on appeal shall be final G and conclusive. In other words, the door against the plaintiff's entry into any further litigation has been bolted doubly secure. The first bolt is his failure to appeal within 30 days and the second bolt is that the decision of the authorities, one way or the other, would have been final. There are numerous Federal Court decisions to this effect (see *Metal Industry* H *Employees Union v Registrar of Trade Unions & Ors* [1976] 1 MLJ 220; *Electrical Industry Workers Union v Registrar of Trade Unions & Anor* [1976] 1 MLJ 177).

Mr Prakash for the plaintiff came well prepared in spite of his earlier request for an adjournment. He relied heavily on *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan* I *Tanggungan* [1999] 3 MLJ 1, a decision of the Federal Court which advocated that where a party sought judicial review based on distinct principles of publication on general issues of law and where the party

seeking the review had clearly raised 'an arguable case', that the public body had acted unfairly, had abused its powers and had raised the general question of the extent to which representations can bind public bodies, and because these grounds involve a consideration of generalized principles of public law developed by the courts to control the exercise of power by public authorities, judicial review would be more appropriate rather than to proceed by way of an appeal. I have read the case and am of the view that the Federal Court went into great pains to explain that in the circumstances of that particular case where the court was concerned with a planning case involving a housing project, the object of which was to provide homes for members of a cooperative society belonging to the less affluent section of society, a swift means of redress was indicated and judicial review was preferred rather than to proceed by way of an appeal. Unfortunately, Mr Prakash did not demonstrate in his submission that the first respondent had acted unfairly or had abused his powers to warrant judicial interference. He merely pointed out that since 1999, that is after *Majlis Perbandaran Pulau Pinang*'s case, there is a shift in judicial opinion 'with regard to the existence of an internal appeal notwithstanding the right of the courts to review the decision of a public authority'. Whilst there clearly is such a trend, but as I have said, it is limited to cases where it must be shown that a party had acted unfairly or had abused its powers, or that like *Majlis Perbandaran Pulau Pinang*'s case, it was more expedient to go for judicial review than to go for appeal.

Even on this last ground, it is clear that the appeal to the minister should have been done within 30 days of the decision. Surely that decision would have been more expeditiously obtained from the minister than this present judicial review, which although filed on 6 April 1995 has taken six years and six months to conclude on a preliminary issue. In the case before me, other than the issue of the plaintiff that the members of the second defendant are merely casual workers, there is no affidavit or other evidence or even a plea in the statement of claim that the first defendant had acted unfairly or had abused his powers or had acted in breach of any rules.

Having considered the submissions, I was of the view that the preliminary objection must be upheld and consequently, I dismissed the suit with costs.

Preliminary objection upheld and suit dismissed with costs.

Reported by Chew Phye Aun